No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

A. C. BECKEN CO., an Illinois Corporation,
Respondent, Cross-Petitioner,

vs.

THE GEMEX CORPORATION,
a New Jersey Corporation,
Petitioner, Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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BRIEF OF CROSS-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court on the issue of damages are reported at 199 F. Supp. 544. The Opinion of the Court of Appeals is reported at 314 F.2d 839. A previous opinion of the Court of Appeals on the issue of liability appears at 272 F.2d 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Cross-Petition.

STATEMENT

The history of this litigation and a summary of the damage issue and award of the Courts below are set forth in the Petition for Writ of Certiorari filed on May 23, 1962 by petitioner and cross-respondent, The Gemex Corporation.* Such Petition also contains an appendix setting forth pertinent findings of fact, conclusions of law and opinions of the Courts below, to which reference is herein made.

In its Cross-Petition for Writ of Certiorari, plaintiff and cross-petitioner, A. C. Becken Co., asks this Court to brings before it for review a decision of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Northern District of Illinois awarding to cross-petitioner treble damages in the amount of $74,294.04. Cross-petitioner also challenges the reasonableness of the award to it by the Court of Appeals of attorney's fees in the amount of $17,500.00. Both of these awards were made subsequent to an adjudication that The Gemex Corporation's refusal to sell watchbands to cross-petitioner on August 2, 1956 constituted a violation of the anti-trust laws (Opinion, App. B to Petition).

Cross-petitioner's theory on the issue of damages is that Gemex's refusal, on August 2, 1956, to supply its watchbands to cross-petitioner subsequently deprived cross-petitioner of watchband sales and profits therefrom. The damages claimed by cross-petitioner, and awarded by the Courts below, purport to represent the loss of such *anticipated* profits.

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* Originally designated as No. 1122 in the October Term, 1962, this cause has been reassigned as No. 150 in the October Term, 1963.

Cross-petitioner's computation of its prospective losses of anticipated profits was based solely upon the opinion of one man, cross-petitioner's own president (App. 72-75, 95-102). This witness testified that, on the basis of his own estimates, his company's profits on Gemex watchbands would normally have been expected to increase by 50% in the first full year following the refusal to deal, by 33% and 25% in the next succeeding years, and by 15% in each of the final two years (Finding 13 *et seq.*, App. C to Petition). Cross-petitioner's president did not, however, discuss market potential as a basis for his opinion, but merely *assumed* the availability of a rapidly expanding market, sufficient to support the increased sales and profits as to which he postulated:

At the trial on the issue of damages, evidence was offered directly attacking cross-petitioner's primary assumption—that the available market for Gemex watchbands sold by cross-petitioner would have sufficiently increased in the five years following the refusal to deal to enable cross-petitioner to have realized increases of 50%, 33%, 25%, 15% and 15% respectively. To demonstrate the error in the opinion of cross-petitioner's president, evidence of actual market conditions during the period in question was introduced. This evidence shows that the available market for Gemex watchbands, as well as for watchbands in general sold by cross-petitioner, was declining throughout the period in question, not increasing as cross-petitioner's president optimistically assumed (See Ex. Vol., Defendant's Exhibits 1, 2, 8, 11 and 12).*

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* Cross-petitioner misleadingly asserts (Cross-Pet., p. 5) that its "actual sales experience for four years after the cutoff date substantiated the accuracy of the original projections", and refers to "Becken's own sales increases during the period." Although cross-petitioner's sales in several watchband line did expand slightly after the cutoff (while

Notwithstanding the uncontroverted evidence that the available market for Gemex watchbands was declining in the years following 1956, the Courts below accepted the opinion of cross-petitioner's president that cross-petitioner could reasonably have expected progressive yearly increases in profits from sales of Gemex watchbands during the period in question. To the extent, however, that cross-petitioner's president projected the increases in profits at rates of 50%, 33⅓%, 25%, 15% and 15% in the five years following the cutoff, the District Court rejected such opinion evidence, estimating on the basis of actual market conditions that the projected increases in profits would more reasonably approach 33⅓% the first year and 20%, 10%, 5% and 5% in the subsequent years.**

The District Court also found as a matter of fact that cross-petitioner had improperly taken into account in its computation certain commissions paid to salesmen on sales of Gemex watchbands. The trial court recomputed the deduction for sales commissions paid by cross-petitioner to correct this error (Set Findings 3-12, App. C to Petition).

Accordingly, cross-petitioner's original projection of its anticipated profits, as based solely upon the opinion of its

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* (Continued)
the majority continued downward) the evidence shows and the trial court found that the total market for watchbands sold by cross-petitioner declined in the years subsequent to 1956 (Ex. Vol., Defendant's Exhibits 1 and 2; Finding 14, App. C to Petition). The market for Gemex brand watchbands had similarly contracted, as shown by cross-respondent's own sales records (Ex. Vol., Defendant's Exhibits 11 and 12).

** The District Court found (Finding 20, App. C to Petition):

> "Plaintiff's projections of purchases and sales of Gemex watchbands for the fiscal years ending January 31, 1957 through January 31, 1961, are excessive and inaccurate."

president, was modified in only two respects. As the trial court found. (Finding 2(a), App. C to Petition):

> "The plaintiff's *prima facie* estimated loss figure of $56,475.95 must be reduced by (i) a sum attributable to payment of salesmen's commissions not otherwise credited against plaintiff's estimates of gross purchases from defendant to the extent of estimated sales for which such commissions would be payable; (ii) a sum attributable to excessive estimation of increase in plaintiff's gross sales income from Gemex watchbands."

The Court of Appeals affirmed the trial court's award of damages based upon these findings of fact. In so doing, the Court held that it was proper to test the projections of cross-petitioner's president against evidence of actual market occurrences during the period, and that the District Court's findings as to salesmen's commissions were not clearly erroneous. The Court of Appeals also found, on the basis of the record before it, that an award of $17,500.00 in attorney's fees to cross-petitioner would be reasonable and that the amount originally awarded by the District Court was excessive.

In its Cross-Petition for Writ of Certiorari, A. C. Becken Co., in essence, complains that these awards are inadequate, and urges this Court to review the evidence previously considered by the Courts below in making their determination. As to the award of damages, cross-petitioner asserts that both the District Court and the Court of Appeals placed undue emphasis on certain evidence relating to actual market conditions which was held to demonstrate that cross-petitioner's *prima facie* computation of damages was excessive and unrealistic. In connection with attorney's fees, cross-petitioner asks this Court to substitute its judgment for that of the Court of Appeals in making the award.

REASONS FOR DENYING THE CROSS-PETITION

There are no considerations which warrant review by this Court of the questions presented by the Cross-Petition. Cross-petitioner does not urge that the decision below is in conflict with decisions of this Court or with decisions of courts of other circuits. Nor does cross-petitioner argue that the courts below committed any fundamental error of law.

In each of the questions presented by cross-petitioner, the gist of the argument is that the courts below failed to properly evaluate the evidence in the record and that, accordingly, this Court should review what cross-petitioner characterizes as the "standard of proof" in such cases. It is submitted that these issues are largely factual, are peculiar to this individual case, and involve no questions of public policy.

The questions thus presented by the Cross-Petition are, at best, narrow ones which have uniformly been decided contrary to cross-petitioner's position in various federal courts which have had occasion to consider them.

I. The Courts Below Properly Tested Cross-Petitioner's Projections Of Anticipated Profits Against Evidence Of Actual Market Conditions.

Cross-petitioner contends that it was improper to consider evidence of actual occurrences and experience during the damage period in connection with the estimates of future damage introduced by cross-petitioner as proof of its *prima facie* case. Thus, cross-petitioner asserts that the courts below erred in weighing evidence which strikingly demonstrates that available markets for Gemex watchbands were steadily decreasing during the five year period following Gemex's refusal to deal on August 2, 1956 and that cross-petitioner's projections of its antici-

pated profits were inconsistent with such market experience.

To the same argument, the Court of Appeals said in part (App. D to Petition, page 27a):

> "While the evidence at the first hearing was a reliable basis for prognostication and was legally admissible to prove damage, no one can deny that to the extent future events modified its correctness, the entire evidence must be considered together."

The primary position advanced by cross-petitioner is the contention that the Courts below adopted some new "standard of proof". Cross-petitioner infers that this standard of proof departs in some way from settled principles and the policy of the anti-trust laws. Significantly, however, cross-petitioner cites no authority for the principles and policy from which the District Court and Court of Appeals are said to have departed. Indeed, it appears to be well-established in the anti-trust law that evidence of actual market conditions is proper to impeach opinion evidence as to loss of anticipated profits. *Clapper* v. *Original Tractor Cab Co.*, 7 Cir., 1959, 270 F.2d, 616; *Flintkote Co.* v. *Lysfjord*, 9 Cir., 1957, 246 F.2d 368; *cf. Bigelow et al.* v. *RKO Radio Pictures*, 1946, 327 U.S. 251.

Undoubtedly, litigants such as cross-petitioner will often find it convenient to ignore direct evidence of loss and to rely solely upon the estimates of expert witnesses to prove their damages. In those cases where a complaining litigant is entitled to assert his rights before the entirety of his losses have accrued, it is, of course, necessary that such losses be forecast on a reasonable basis.* But it is also

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* The Petition for Writ of Certiorari filed herein by The Gemex Corp. questions whether cross-petitioner is entitled to recover damages accruing after the filing of the complaint on the mere assumption that the refusal to deal would continue beyond the period alleged in the complaint. A resolution of this issue would render moot most of the factual questions posed in the Cross-Petition.

well-settled that courts are not barred in such cases from having the benefit of conditions occurring while the suit is pending to test such forecasts. Particularly apposite are the observations of Mr. Justice Cardozo in *Sinclair Refining Co.* v. *Jenkins*, 289 U.S. 689, 699, where this Court held that such subsequent evidence, if available, is proper:

> "Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within."

II. The Deduction For Commissions Paid On Mail Order Sales Was Computed On A Reasonable Basis And Is Not Clearly Erroneous.

Cross-petitioner also urges, as it did in the Court of Appeals, that the District Court erred in considering a deduction for commissions paid on mail order sales in its computation of damages.

The District Court found that cross-petitioner ordinarily paid a 10% commission on its sales of watchbands (Finding 4, App. C to Petition). On mail order sales, however, no such commission was paid unless the mail order was placed within a six month period following solicitation of the customer by cross-petitioner's salesmen. Under those circumstances, a 5% commission was customary (Finding 8(b), App. C to Petition). Finding that cross-petitioner had destroyed, within two years after filing this suit, the only records by which the exact amount of commissions paid on mail order sales could be computed, the District Court considered existing evidence and held that a deduction of 4.5% representing an average commission paid on all mail orders sales was proper (Findings 8 and 9, App. C to Petition).

The Court of Appeals, after considering the findings of fact discussed above, found that the District Court's deduction for mail order sales commissions was computed on a reasonable basis and did not involve a double deduction. The Court correctly held that cross-petitioner was not entitled to complain of uncertainties in such computation which resulted from its own wilful destruction of records after the filing of this suit, and that the District Court's findings were not clearly erroneous under Rule 52(a), F.R.C.P. (App. D to Petition, pp. 27a-29a).

The determination of the courts below on this question is amply supported by the record and provides no basis for review by this Court.

III. The Court of Appeals Properly Reduced the Award of Attorney's Fees

Finally, cross-petitioner asks this Court to review the standards applicable to a determination of reasonable attorney's fees in anti-trust litigation. It is submitted that, as the cases cited by cross-petitioner demonstrate, the subject of attorneys' fees is one which is peculiar to each individual case, and properly within the discretion of a court which is familiar with the history of the particular litigation. In the instant case, the Court of Appeals was in a position to evaluate the many factors which influence the amount of recoverable attorneys' fees and to determine, on the basis of such evidence, a reasonable award.

CONCLUSION.

There is no basis on which the Cross-Petition can be granted and, accordingly, we pray that it be denied.

Respectfully submitted,

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August 8, 1963.